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Supreme Court No. _____
Court of Appeals No. 56265-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION, a Washington Non-Profit Corporation,

Respondent

vs.

SATOMI, LLC, a Washington Limited Liability Company,

Petitioner.

SATOMI, LLC'S PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

I. IDENTITY OF PETITIONER

Petitioner is Satomi, LLC, a Washington limited liability company ("Satomi").

II. COURT OF APPEALS DECISION

On June 11, 2007, the Court of Appeals filed a published decision in *Satomi Owners Association v. Satomi LLC*, No. 56265-7-I. Copies of the Court of Appeals' majority opinion and dissenting opinion are attached as Appendix A. *See Satomi Owners Ass'n v. Satomi, LLC*, --- Wn. App. ---, 159 P.3d 460 (2007). This Petition for Review seeks review of the portion of the Court of Appeals' majority decision holding that a provision of the Washington Condominium Act, Chapter 64.34 RCW (the "WCA"),[1] calling for judicial enforcement of statutory condominium warranties is not preempted by the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (the "FAA").[2] No motion for reconsideration has been filed.

[1] Attached as Appendix B is a copy of the former version of the relevant section of the WCA in effect at the time the Association filed its lawsuit (RCW §64.34.100 (2005)). Attached as Appendix C is the current version of RCW §64.34.100. The statute's amendments concern only non-binding arbitration. The statute's effect regarding binding arbitration provisions, such as the arbitration agreement at issue in this matter, remains unchanged.

[2] A copy of the FAA is attached as Appendix D.

III. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that the WCA's provision for judicial enforcement of statutory condominium warranties is not preempted by the FAA?[3]

IV. STATEMENT OF THE CASE

Satomi developed the Satomi Condominiums, a condominium complex comprised of 85 units in 18 buildings, located in Bellevue, Washington. Clerks Papers ("CP") 18. When each of those condominium units was sold, each purchaser signed a warranty addendum (the "Warranty Addendum") that states the various warranties Satomi was providing to the purchasers. CP 163-76, 1383-84. In the Warranty Addendum, the purchasers agreed to arbitrate any claims against Satomi for (1) breach of the warranties in the Warranty Addendum and (2) breach of *any other warranty* relating to the Satomi Condominiums. *See, e.g.*, CP 170. Despite that agreement, the purchasers' homeowners association, Respondent Satomi Owners Association (the "Association"), sued Satomi for breaches of warranties relating to the Satomi Condominiums and refused to arbitrate those claims as required by the Warranty Addendum.[4]

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[3] Since this legal question affects the validity of a State statutory provision, this Petition is also being served upon the Washington State Attorney General.

[4] The Association alleged defects in construction and construction materials and resulting damages throughout the Satomi Condominium complex, and, based on those allegations, the Association claimed that Satomi breached express and implied warranties under the

The Association filed a motion to quash Satomi's arbitration demand. CP 37, 18-106. Satomi opposed the Association's motion and cross-moved to compel arbitration, arguing that the FAA preempts the WCA's judicial enforcement provisions and requires arbitration of the Association's claims. CP 109-137.

The Superior Court granted the Association's motion to quash Satomi's arbitration demand, thereby denying Satomi's cross-motion to compel arbitration. CP 143-44. The Superior Court based its order in part on the erroneous conclusion that the FAA does not preempt the WCA's provision for judicial enforcement of the Association's WCA claims. CP 144. The Superior Court also denied Satomi's motion to reconsider. CP 1394-95.

Satomi appealed the Superior Court's orders quashing Satomi's arbitration demand and denying reconsideration. CP 1389-93, 1396-99. Satomi and the Association fully briefed and argued the issue of the FAA's preemption before the Court of Appeals. More than six months after the Court of Appeals heard oral argument, but before the Court of Appeals issued a decision on the appeal, Satomi and the Association reached a financial settlement. The Association then moved to terminate appellate review.

WCA and under the "Implied Warranty of Habitability" and thereby violated the Washington Consumer Protection Act, Chapter 19.86 RCW (the "CPA"). CP 3-9.

Satomi opposed termination of review because of the substantial public interest in the issue of the FAA's preemption and the arbitrability of condominium construction defect claims asserted under the WCA. Further evidencing that substantial public interest, the Master Builders Association of King and Snohomish Counties (the "MBA") and Blakely Village, LLC ("Blakeley Village") filed *amicus* briefing vigorously supporting completion of the Court of Appeals' review. *See* Appendix A, footnote 50. The MBA is the largest home builders association in the United States, founded to address issues affecting the housing industry. Blakely Village is Satomi's sister company and currently faces a similar lawsuit in King County Superior Court (No. 06-2-03941-6), in which the plaintiff homeowners association alleges construction defects in violation of the WCA but has refused to arbitrate those claims as required by the parties' arbitration agreement. The Blakely Village lawsuit was stayed pending the Court of Appeals' decision in this matter.

Concluding that the appeal involved recurring issues which should be determined, the Court of Appeals denied the Association's motion to terminate review and issued a 2-1 decision. *See* Appendix A, footnote 50. The majority's opinion holds that the Association's claims under the "Implied Warranty of Habitability" and the CPA are arbitrable, but that the Association's WCA claims are not arbitrable because the FAA does

not preempt the WCA's provisions calling for judicial enforcement of those claims, despite the fact that Congress intended the FAA to extend to the broadest reaches of Congress's Commerce Clause power. *See* Appendix A. The dissent strongly disagreed, concluding that the FAA's preemption of the WCA requires arbitration of the Association's WCA claims. *See* Appendix A.

Satomi has timely filed this Petition for Review, and the MBA has contemporaneously submitted an *amicus* memorandum supporting this Petition for Review, along with a motion for permission to file the *amicus* memorandum.

V. ARGUMENT

As more fully described in the MBA's *amicus* memorandum supporting this Petition for Review, this Court should accept review for the following reasons:

First, RAP 13.4(b)(3) provides for acceptance of review "[i]f a significant question of law under the Constitution ... of the United States is involved." Here, the FAA's preemption of the WCA turns on whether Congress's power under the Commerce Clause (Article I, § 8, cl. 3 of the United States Constitution) extends to regulation of construction defect claims arising out of Satomi's construction and sale of the Satomi

Condominiums. Thus, this Petition involves a significant question of law under the United States Constitution, and this Court should accept review.

Second, RAP 13.4(b)(1) provides for acceptance of review "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." The majority opinion published by the Court of Appeals in this case is in conflict with this Court's decisions recognizing the FAA's embodiment of a liberal federal policy favoring arbitration agreements and the FAA's broad reach to preempt contrary state law. *See, e.g.*, *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 341-44, 103 P.3d 773 (2004) (FAA preemption of a Washington statute reserving the right to a judicial forum for employment discrimination claims); *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 588-90, 681 P.2d 253 (1984) (FAA preemption regarding Washington State consumer protection and securities claims); *Allison v. Medicab Int'l.*, 92 Wn.2d 199, 203-04, 597 P.2d 380 (1979) (FAA preemption of Washington statute requiring a judicial forum for breach of franchise agreement claims). This Court's resolution of this conflict is imperative for proper application of the FAA by lower courts in Washington.

Finally, RAP 13.4(b)(4) provides for acceptance of review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." The public interest is plainly

implicated here because (1) nearly all condominium sales in Washington include arbitration provisions similar to the arbitration provision at issue on this Petition;[5] (2) this Court's acceptance of review will provide proper guidance for Washington courts as to the enforceability of those arbitration provisions and will correct the Court of Appeals' erroneous limitation of the FAA's preemptive reach; and (3) the issue in the instant Petition is obviously likely to recur, as is evidenced by the Blakeley Village lawsuit, which is currently pending and involves the same issue. *See* Appendix A, footnote 50 (Court of Appeals holding that "the issues here will recur and should be determined..."). Thus, the Court's decision will benefit the public, for it will clarify the issue of whether arbitration clauses in condominium sales contracts are enforceable under the FAA in Washington.[6] *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (accepting review under RAP 13.4(b)(4) because "[t]he Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue").

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[5] *See* Declaration of Leslie Williams in Support of Opposition to Respondent's Motion to Terminate Review By [Proposed] *Amicus* Master Builders Association of King and Snohomish Counties at ¶3, filed with the Washington State Court of Appeals, Division I on Jan. 19, 2007.

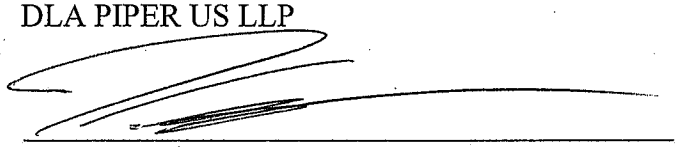
[6] As the Court of Appeals recognized and as more fully discussed in the MBA's *amicus* memorandum supporting this Petition for Review, the substantial public interest implicated by this petition also compels acceptance of review despite the parties' settlement.

VI. CONCLUSION

For the reasons stated above and in the MBA's *amicus* memorandum supporting this Petition for Review, Satomi respectfully requests that this Court accept review of the portion of the Court of Appeals' majority decision holding that the WCA's provision for judicial enforcement of statutory condominium warranties is not preempted by the FAA.

RESPECTFULLY SUBMITTED this 11th day of July, 2007.

DLA PIPER US LLP



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CERTIFICATE OF SERVICE

I, Stephanie Tucker, certify that on the 11th day of July, 2007, I caused to be served copies of the following documents to the following parties:

1. Satomi, LLC's Petition for Review; and

2. this Certificate of Service.

Ms. Marlyn K. Hawkins
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SIGNED this 11th day of July, 2007, at Seattle, Washington.

Stephanie Tucker

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Appendix A

Satomi Owners Ass'n v. **Satomi**, LLC
Wash.App. Div. 1,2007.

Court of Appeals of Washington,Division 1.
SATOMI OWNERS ASSOCIATION, a Washington nonprofit corporation, Respondent,
v.
SATOMI, LLC, a Washington limited liability company, Appellant.
No. 56265-7-I.

June 11, 2007.

Background: Condominium owners' association brought action against construction company, alleging breach of contractual warranties, breach of implied and express warranties under the Washington Condominium Act, breach of implied warranty of habitability, and violations of the Consumer Protection Act. Construction company demanded arbitration of claims. The Superior Court, King County, Bruce W. Hilyer, J., quashed the arbitration demand. Construction company appealed.

Holdings: The Court of Appeals, Ellington, J., held that:

(1) contractual and common law warranty claims were subject to arbitration, and

(2) statutory warranty claims under the Washington Condominium Act were not subject to arbitration under the Federal Arbitration Act.

Affirmed in part, reversed in part, and remanded.

Agid, J., filed a dissenting opinion.

West Headnotes

[1] Alternative Dispute Resolution 25T ⇐141

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 k. Persons Affected or Bound. Most Cited Cases

Purchase and sale agreements for condominium units expressly required the original unit owners to bind later purchasers to the terms of the warranty addendum, and thus, all owners were bound by the arbitration agreement contained in the addendum.

[2] Condominium 89A ⇐17

89A Condominium
89Ak17 k. Actions. Most Cited Cases

If a condominium association merely represents its owner/members, its standing is derivative, and it is subject to any defenses and limitations that may be asserted against them and is without a separate right to recover; its claim is only as good as that of its constituent members.

[3] Contracts 95 ⇐205.35(2)

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k205 Warranties
95k205.35 Sale of Dwellings; Habitability
95k205.35(2) k. New Buildings; Sales by Builders and Commercial Activity. Most Cited Cases

The implied warranty of habitability runs from the builder-vendor to the original purchaser.

[4] Antitrust and Trade Regulation 29T ⇐290

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)1 In General
29Tk287 Persons Entitled to Sue or Seek Remedy
29Tk290 k. Private Entities or Individuals. Most Cited Cases

Private rights of action under the Consumer Protection Act belong only to the individual

allegedly deceived in a consumer transaction. West's RCWA 19.86.090.

[5] Alternative Dispute Resolution 25T ⚿141

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk141 k. Persons Affected or Bound. Most Cited Cases

Condominium 89A ⚿17

89A Condominium
89Ak17 k. Actions. Most Cited Cases
Condominium unit owners' association brought action against construction company in a representative capacity on behalf of unit owners, and thus, if the claims were subject to arbitration in accordance with arbitration agreement that individual owners entered into, then the association was required to arbitrate its claims against company.

[6] Alternative Dispute Resolution 25T ⚿113

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 k. Arbitration Favored; Public Policy. Most Cited Cases

Alternative Dispute Resolution 25T ⚿139

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 k. Construction in Favor of Arbitration. Most Cited Cases
Washington has a strong policy favoring arbitration of disputes, and any doubts about the scope of arbitrable issues are resolved in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

[7] Alternative Dispute Resolution 25T ⚿114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases
The Federal Arbitration Act's (FAA) basic purpose is to overcome courts' unwillingness to enforce arbitration agreements. 9 U.S.C.A. § 2.

[8] Commerce 83 ⚿5

83 Commerce
83I Power to Regulate in General
83k2 Constitutional Grant of Power to Congress
83k5 k. Commerce Among the States. Most Cited Cases

Commerce 83 ⚿7(2)

83 Commerce
83I Power to Regulate in General
83k2 Constitutional Grant of Power to Congress
83k7 Internal Commerce of States
83k7(2) k. Activities Affecting Interstate Commerce. Most Cited Cases
Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control; only the general practice subject to federal control need have a substantial effect on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[9] Alternative Dispute Resolution 25T ⚿119

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk118 Matters Which May Be Subject to Arbitration Under Law
25Tk119 k. In General. Most Cited Cases
Contractual and common law warranties are subject to arbitration.

[10] Alternative Dispute Resolution 25T ⚿122

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk118 Matters Which May Be Subject to Arbitration Under Law
25Tk122 k. Property Ownership and Rights. Most Cited Cases

Condominium 89A ⚿17

89A Condominium
89Ak17 k. Actions. Most Cited Cases
The right to a judicial forum for resolution of Washington Condominium Act warranty disputes cannot be waived. RCW 64.34.100(2).

[11] Alternative Dispute Resolution 25T ⚿114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases

Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases
Purchase and sale transaction of condominium units did not involve interstate commerce for purposes of the Federal Arbitration Act (FAA), and thus, condominium unit owners' association's statutory warranty claims under the Washington Condominium Act were not subject to arbitration, even though the condominium project used materials from out of state, where the transaction represented a garden variety Washington real estate deal, involving a Washington company and Washington residents, the sale of property was entirely governed by state law, the warranties in question arose entirely from state law, and the transactions had none of the earmarks of an economic activity that in the aggregate represented a general practice subject to federal control. 9 U.S.C.A. § 2; West's RCWA 64.34.443, 64.34.445.

[12] Alternative Dispute Resolution 25T ⚿114

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases

Commerce 83 ⚿80.5

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 k. Arbitration. Most Cited Cases
Where the issue is federal regulation of the business itself, for example, enforcement of the rights of employees to nondiscriminatory and healthy workplaces, the transaction involves the internal operation of the business, and business' use of materials shipped in interstate commerce is enough to characterize that business as affecting commerce for purposes of the Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

[13] Condominium 89A ⚿4

89A Condominium
89Ak4 k. Sales by Developer. Most Cited Cases
Warranty under the Washington Condominium Act that the condominium be free from defective materials and constructed in accordance with applicable state law amounts to a guarantee that the builder has examined the materials used and ensures they are of sound quality and suitable for the use to which they are put, on site, in Washington state. RCW 64.34.445.

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Marlyn Kathryn Hawkins, Dean Eric Martin, Barker Martin PS, Seattle, WA, for Respondent.
Sharon Elizabeth Cates, Microsoft Corp, Redmond,

WA, Thomas Fitzgerald Ahearne, Foster Pepper PLLC, Seattle, WA, Amicus Curiae on behalf of Master Builders Assoc. of King and Snohomish Counties.
Kit William Roth, DLA Piper Rudnick Gray Cary U.S. LLP Seattle, WA, Daniel Louis Dvorkin, Salmi & Gillaspy PLLC, Bellevue, WA, for Appellant and Amicus Curiae on behalf of Blakely Village, LLC.
Lori Kay McKown, David E. Chawes, Preg, O'Donnell & Gillett PLLC, Seattle, WA, Amicus Curiae on behalf of Leschi Corp.
ELLINGTON, J.
¶ 1 The chief question here is whether the Washington statute providing for judicial enforcement of statutory condominium warranties must yield to the federal arbitration statute, solely because some construction materials came from outside Washington state. We hold that under the circumstances here, the commerce clause does not reach so far, and the state statute controls.

BACKGROUND

¶ 2 Satomi, LLC (the Company) developed the Satomi Condominium, an 85-unit complex located in Bellevue. In 2005, the Satomi Owners Association (the Association) filed suit against the Company alleging numerous construction defects and other deficiencies throughout the complex, and claiming breach of contractual warranties, breach of implied and express warranties under the Washington Condominium Act, chapter 64.34 RCW (WCA), breach of the implied warranty of habitability, and violations of the Consumer Protection Act, chapter 19.86 RCW (CPA).

¶ 3 The Company denied the allegations and demanded arbitration based on the arbitration clause in the warranty addendum, which was an attachment to the original purchase and sale agreements. The Company asserted that most of the building materials used to construct the condominium were manufactured and shipped in interstate commerce, and the Association's claims were therefore subject to arbitration under the Federal Arbitration Act, 9 U.S.C.A. §§ 1-6(FAA).

*463 ¶ 4 The Association moved to quash the demand for arbitration, contending it is not bound by the agreement and that in any event, the agreement violates the judicial enforcement provision of the WCA, which is not preempted by the FAA because the contract does not involve interstate commerce.

¶ 5 The trial court quashed the demand for arbitration motion on three grounds:
(1) The Company did not prove that all of the individual owners agreed to arbitrate.
(2) Even if the individual owners agreed to arbitrate, the Association "is a legally separate corporate entity which is neither a 'successor or transferee' to [the Association]. Thus, the arbitration clause is simply inapplicable." FN1

FN1. Clerk's Papers at 144.

(3) The FAA does not apply because *Marina Cove Condominium Owners Ass'n v. Isabella Estates* FN2 held that condominium sales primarily impact Washington residents.

FN2. 109 Wash.App. 230, 34 P.3d 870 (2001).

¶ 6 The Company appeals. Our review is de novo.FN3

FN3. *Walters v. A.A.A. Waterproofing,* 120 Wash.App. 354, 357, 85 P.3d 389 (2004).

DISCUSSION

¶ 7 The Company argues the court erred, and that all unit owners agreed to arbitrate their claims, the Association is bound to arbitrate these issues in the same manner as the unit owners, and the FAA applies and mandates arbitration. We agree with the first two arguments, but not the third.

I. Applicability of Arbitration Agreement to Association

[1] ¶ 8 The Association acknowledges that all original owners signed the warranty addendum, but

contends that later purchasers are not bound by it. This argument has no merit. The purchase and sale agreement expressly required original unit owners to bind later purchasers to the terms of the addendum. All owners are therefore bound by the agreement to arbitrate.

¶ 9 The Association next contends the agreement has no application here because the Association is a separate legal entity.

[2] ¶ 10 The WCA requires condominiums to have a homeowners' association whose membership consists solely of the unit owners, all of whom must belong. FN4 Among other powers, a homeowners' association may "[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." FN5 An association may act on its own behalf when the proceedings occur "in connection with its own functions and activities." FN6 But if an association merely represents its owner/members, its standing is derivative, and it is subject to any defenses and limitations that may be asserted against them and is without a separate right to recover. FN7 In other words, " '[i]ts claim ... is only as good as that of its constituent members.' " FN8

FN4. RCW 64.34.300.

FN5. RCW 64.34.304(1)(d).

FN6. 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 12.5, at 40 (2d ed.2004) (citing RCWA 64.34.304(1)(d)).

FN7. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 413-14, 745 P.2d 1284 (1987) (under previous version of WCA, homeowners' association was not separate juristic entity, and claims were brought in representative capacity for individual homeowners whose rights were at issue); *see also Klay v. Pacificare Health Sys., Inc.*, 389 F.3d 1191, 1202-03 (11th Cir.2004) ("associations suing in a representative capacity are bound by the same limitations and obligations as their members"); *Meadowbrook Condo. Ass'n v. S. Burlington Realty Corp.*, 152 Vt. 16, 565 A.2d 238, 241 (1989).

FN8. *Meadowbrook Condo. Ass'n,* 565 A.2d at 241 (quoting trial court).

[3][4] ¶ 11 Such is the case here. The claims asserted belong to the individual unit owners. In addition to violations of the CPA, the Association alleges breaches of warranties***464** under the WCA, the purchase contract, and the implied warranty of habitability, resulting in damage to property owned by its members. FN9 But the WCA's express and implied warranties run to the unit purchasers, not the Association, FN10 the implied warranty of habitability runs from the builder-vendor to the original purchaser, FN11 the contract warranties do not run to the Association, and private rights of action under the CPA belong only to the individual allegedly deceived in a consumer transaction. FN12 Given the nature of the claims here, the Association necessarily brought this action in a representative capacity, not on its own behalf as a separate juristic entity.

FN9. Common elements are all of the portions of a condominium other than the units. RCW 64.34.020(6). Limited common elements are portions of the common elements reserved for the exclusive use of one or more but fewer than all of the units. RCW 64.34.020(22). The individual unit owners own the common elements and the limited common elements. *See* RCW 64.34.204(2), (4), .224(1), .228(1).

FN10. *See* RCW 64.34.443(1) ("Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows...."); RCW 64.34.445(6) ("Any conveyance of a unit transfers to the purchaser all of the

declarant's implied warranties of quality.").

FN11. *Stuart,* 109 Wash.2d at 416, 745 P.2d 1284.

FN12. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 792-93, 719 P.2d 531 (1986) (only a person injured in his business or property may bring a private action under the CPA).

[5] ¶ 12 The Association stands in the shoes of the individual unit owners. The trial court erred when it concluded the arbitration clause does not apply to the Association. If the claims are subject to arbitration, the Association must arbitrate.

¶ 13 The remaining question is whether statutory warranty claims are subject to arbitration because the Federal Arbitration Act preempts state law.

II. Applicability of The Federal Arbitration Act

¶ 14 The Association contends that we decided this issue in *Marina Cove,* wherein we held that condominium purchase and sale agreements between Washington companies and Washington residents do not implicate the FAA. FN13 But as explained below, we must revisit this issue here.

FN13. *Marina Cove,* 109 Wash.App. at 244, 34 P.3d 870.

[6] ¶ 15 Washington has a strong policy favoring arbitration of disputes, FN14 and any doubts about the scope of arbitrable issues are resolved in favor of arbitration " 'whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' " FN15

FN14. *Zuver v. Airtouch Commc'ns, Inc.,* 153 Wash.2d 293, 301 n. 2, 103 P.3d 753 (2004).

FN15. *Kamaya Co., Ltd. v. American Prop. Consultants, Ltd.,* 91 Wash.App. 703, 714, 959 P.2d 1140 (1998) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

[7] ¶ 16 Congress also favors arbitration of disputes, and to that end enacted the Federal Arbitration Act. The FAA's basic purpose is to overcome courts' unwillingness to enforce arbitration agreements. FN16 Where it applies, the FAA preempts state law, prohibiting application of state statutes that invalidate arbitration agreements.FN17 The FAA provides as follows:

FN16. *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 270, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

FN17. *Id.* at 272, 115 S.Ct. 834.

A written provision in any maritime transaction or a contract evidencing *a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[FN18]

FN18. 9 U.S.C.A. § 2 (emphasis added).

***465** ¶ 17 The United States Supreme Court most recently considered the scope of the FAA in *Citizens Bank v. Alafabco, Inc.,* FN19 which involved debt restructuring arrangements between an Alabama bank and an Alabama construction company. In concluding the transactions were governed by the FAA, the Court described the phrase "involving commerce" as the "functional equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." FN20

FN19. 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003).

FN20. *Id.* at 56, 123 S.Ct. 2037.

[8] ¶ 18 The Court emphasized that the Commerce Clause power " 'may be exercised in individual cases without showing any specific effect upon interstate commerce' *if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.'* " FN21 Only the general practice subject to federal control need have a substantial effect on interstate commerce.[FN22]

FN21. *Id.* at 56-57, 123 S.Ct. 2037 (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed. 1328 (1948)) (emphasis added).

FN22. *Id.* at 57, 123 S.Ct. 2037.

¶ 19 The *Citizens Bank* debt restructuring agreements, although executed in Alabama by Alabama residents, easily met the "involving commerce" test for at least three reasons: (1) Alafabco used funds from loans that were the subject of the debt restructuring agreements to finance large projects throughout the southeastern United States; (2) the restructured debt was secured in part by Alafabco's inventory of goods assembled from out-of-state parts and raw materials; and (3) the general practice represented by the transactions at issue, commercial lending, has a broad impact on the national economy and is clearly within Congress' regulatory power.[FN23]

FN23. *Id.* at 57-58, 123 S.Ct. 2037.

¶ 20 *Citizens Bank* confirmed the broad reach of the FAA announced in 1995 in *Allied-Bruce Terminix Cos. v. Dobson.*[FN24] *Allied-Bruce* involved a homeowner's lawsuit against the companies with whom he contracted for termite protection. An Alabama statute disallowed predispute arbitration agreements. Allied-Bruce and Terminix operated in multiple states and "the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the [contract], came from outside Alabama." [FN25] The United States Supreme Court held that the transaction evidenced by the contract need only "in fact" involve interstate commerce,[FN26] which the parties did not dispute. Thus, the FAA applied and preempted the state statute.[FN27]

FN24. 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

FN25. *Id.* at 282, 115 S.Ct. 834.

FN26. *Id.* at 279-80, 115 S.Ct. 834.

FN27. *Id.*

¶ 21 In another 1995 decision, *United States v. Lopez,*[FN28] the Court described the test of Congress' power to regulate as whether the activity sought to be regulated "substantially affects" interstate commerce. This language in *Lopez* resulted in a number of decisions, including ours in *Marina Cove,* which came between *Lopez* and *Allied-Bruce* in 1995, and *Citizens Bank* in 2003.

FN28. 514 U.S. 549, 559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

¶ 22 In *Marina Cove,* we adopted an interpretation of *Lopez* enunciated in *L & L Kempwood Associates, L.P. v. Omega Builders,*[FN29] in which the Texas Court of Appeals held that a contract for repairs to a Texas apartment complex, entered into by an out-of-state property owner and a Texas contractor, was "not a transaction substantially affecting*466 interstate commerce." [FN30] We applied the same rationale in *Marina Cove* to hold the FAA did not preempt the WCA:

FN29. 972 S.W.2d 819, 822 (Tex.App.Corpus Christi 1998). The Texas Supreme Court reversed, using the same rationale later applied in *Citizens Bank. L & L Kempwood Assocs., L.P. v. Omega Builders, Inc. (In re L & L Kempwood Assocs., L.P.),* 9 S.W.3d 125 (Tex.1999).

FN30. *Marina Cove,* 109 Wash.App. at 244, 34 P.3d 870.

Similarly here, Marina Cove Condominiums were constructed, marketed, and sold solely within the state of Washington. The contract at issue is a limited warranty offered by a Washington corporation on condominium units located within the state, whose owners all reside in Washington. The only connection to other states involves one buyer, who moved to Washington from another state, and another buyer, who transferred funds from an out-of-state bank account for use as a down payment on one unit purchased. That negligible contact with other states does not constitute a substantial effect on interstate commerce. The FAA does not apply.[FN31]

FN31. *Id.*

¶ 23 But in *Citizens Bank,* the Court rejected the "substantially affecting" interpretation as an "improperly cramped view" of the Commerce Clause power, FN32 and held that a significant effect on interstate commerce must be shown only as to the general practice subject to federal control.FN33 Given our application of the discredited "substantially affecting interstate commerce" test, *Marina Cove's* continuing validity is questionable.

FN32. *Citizens Bank,* 539 U.S. at 58, 123 S.Ct. 2037.

FN33. *Id.* at 57, 123 S.Ct. 2037.

¶ 24 We know of only one other case similar to this one, *Basura v. U.S. Home Corporation.*FN34 A California statute permits court actions in construction defect cases, even where the parties have agreed to arbitrate. The California Court of Appeals held the FAA preempted the statute and required arbitration, on grounds that where a subdivision developer utilized out-of-state architects and contractors, engaged in nationwide marketing and advertising using interstate media, and used building materials and equipment manufactured and shipped from multiple states, the purchase agreement involved interstate commerce.FN35

FN34. 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328 (2002).

FN35. *Id.* at 1214, 120 Cal.Rptr.2d 328.

¶ 25 With these authorities in mind, we turn to the claims and facts of this case. The Association's complaint alleges a "variety of construction defects and other deficiencies in building components and/or installation" FN36 constituting breaches of common law, statutory, and contractual warranties. The common law warranty is the implied warranty of habitability.FN37 The statutory warranties are set forth in RCW 64.34.443,FN38 which requires condominium declarants to provide specific implied warranties, and RCW 64.34.445,FN39 ***467** which permits declarants to make express warranties. The warranty addendum to the purchase and sale agreement FN40 set forth express warranties, which appear identical to those implied by the statute:

FN36. Clerk's Papers at 4.

FN37. *Brickler v. Myers Constr., Inc.,* 92 Wash.App. 269, 275, 966 P.2d 335 (1998).

FN38. RCW 64.34.443(1) specifies that the formal words "warranty" or "guarantee" are not needed to create an express warranty, which arise from any one of the following:
"(a) Any written affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;
"(b) Any model or written description of the physical characteristics of the condominium at the time the purchase agreement is executed, including plans and specifications of or for improvements, creates an express warranty that the condominium will conform to the model or

description except pursuant to RCW 64.34.410(1)(v);
"(c) Any written description of the quantity or extent of the real property comprising the condominium, including plats or surveys, creates an express warranty that the condominium will conform to the description, subject to customary tolerances; and
"(d) A written provision that a buyer may put a unit only to a specified use is an express warranty that the specified use is lawful."

FN39. RCW 64.34.445 provides in pertinent part:
"(1) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear and damage by casualty or condemnation excepted.
"(2) A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by such declarant or dealer will be:
"(a) Free from defective materials;
"(b) Constructed in accordance with sound engineering and construction standards;
"(c) Constructed in a workmanlike manner; and
"(d) Constructed in compliance with all laws then applicable to such improvements."

FN40. The Association's complaint alleges the creation of express warranties by public offering statement, advertising materials, advertising statements, and samples. *See* Clerk's Papers at 6. But the warranty addendum limited the warranties to those in the contract. *See* Clerk's Papers at 171, 197.

1. Limited Warranty. The Unit in the Condominium identified above and the Common Elements are suitable for the ordinary uses of real estate of their type and, except as provided below, all parts of the Unit and Common Elements constructed by or for the Declarant are free from defective materials and have been constructed in accordance with applicable law, in accordance with sound engineering and construction standards, and in a workmanlike manner.[FN41]

FN41. Clerk's Papers at 193.

¶ 26 The warranty addendum purports to require arbitration of all warranty disputes:
7. *Seller's Right to Arbitration.* At the option of the Seller, Seller may require that any claim asserted by Purchaser or by the Association *under this Warranty or any other claimed warranty* relating to the Unit or Common Elements must be decided by arbitration, in King County, Washington, under the Construction Arbitration Rules of the American Arbitration Association (AAA) in effect on the date hereof, as modified by this Warranty.[FN42]

FN42. Clerk's Papers at 196 (emphasis added).

[9][10][11] ¶ 27 Contractual and common law warranties are subject to arbitration. WCA warranties, however, are not: "[A]ny right or obligation declared by this chapter is enforceable by judicial proceeding."[FN43] The right to a judicial forum for resolution of WCA warranty disputes cannot be waived.[FN44] The contract warranties are thus arbitrable to the extent they exceed the protections required by RCW 64.34.445, but the statutory right to trial applies to the statutory warranties unless the statute is preempted by the FAA. We must therefore decide whether the purchase and sale transactions involved interstate commerce for purposes of the FAA. We believe they do not, for several reasons.

FN43. RCW 64.34.100(2).

FN44. *Marina Cove,* 109 Wash.App. at

236-37, 34 P.3d 870 (RCW 64.34.100(2) creates a right to judicial enforcement of the WCA that may not be waived).

¶ 28 First, the transaction represented by the contracts here was a garden variety Washington real estate deal. It involved a Washington company and Washington residents. No national marketing occurred, no interstate media were used, no out-of-state architects or contractors were involved.

¶ 29 Second, real property law has historically been the law of each state. FN45 The sale of property, including the requirements for and interpretation of purchase agreements, is entirely governed by state law.

FN45. In addition to an ages-old common law, the state thoroughly regulates real estate law in areas including broker licensing, chapters 18.85-.86 RCW, real estate sale financing, chapters 61.12, .30 RCW, sale and transfer procedures, chapters 64.04-.06 RCW, taxation, Title 84 RCW, and eminent domain, Title 8 RCW.

¶ 30 Third, the warranties in question arise entirely from state law. Unlike *Citizens Bank* and *Allied-Bruce,* where the very subject matter of the contracts involved interstate commerce, here the issues are confined to claims founded in warranties created by the Washington legislature.

¶ 31 Fourth, these transactions have none of the earmarks of an economic activity that in the aggregate would represent a general practice subject to federal control. The Company offers no authority holding that ***468** local real estate transactions represent such a practice, or that warranties required by state law for state condominium projects represent such a practice, or that local regulation of real estate transactions can constitute an economic activity that in the aggregate would represent a general practice subject to federal control. The Company relies upon a single fact: that construction materials came from outside Washington state. In some cases, this is adequate for FAA preemption. Here, it is not.

[12] ¶ 32 Where the issue is federal regulation of the business itself-for example, enforcement of the rights of employees to nondiscriminatory and healthy workplaces-the "transaction" involves the internal operation of the business, and its use of materials shipped in interstate commerce is enough to characterize that business as affecting commerce for purposes of the FAA. FN46 In such cases, the question is the applicability of federal regulation to the conduct of the business.

FN46. *See Katzenbach v. McClung,* 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (Civil Rights Act); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Civil Rights Act); *Daniel v. Paul,* 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969) (Civil Rights Act); *EEOC v. Ratliff,* 906 F.2d 1314 (9th Cir.1990) (Title VII); *Usery v. Lacy,* 628 F.2d 1226 (9th Cir.1980) (OSHA).

¶ 33 Where the issue is a private dispute, however, the analysis must identify the transaction involving commerce. In *Citizens Bank,* the Court reasoned that because the Commerce Clause gives Congress "the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce," it followed that it also permits regulation of "substantial commercial loan transactions secured by such goods." FN47 In *Basura v. U.S. Home Corp.,* FN48 construction materials and appliances came from out of state. In neither case, however, was the presence of interstate materials the only interstate aspect of the case.

FN47. *Citizens Bank,* 539 U.S. at 57, 123 S.Ct. 2037.

FN48. 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328 (2d Dist.2002).

[13] ¶ 34 Here, the only connection to interstate commerce is that materials from elsewhere were used in construction, and some of those were allegedly unsound or unsuitable, thereby violating

the warranty required by RCW 64.34.445 that the condominium be free from defective materials and constructed in accordance with applicable state law. This warranty amounts to a guarantee that the builder has examined the materials used and ensures they are of sound quality and suitable for the use to which they are put, on site, in Washington state. The origin of the materials is irrelevant to the warranty, and the giving of the warranty is not a transaction involving commerce, because in the aggregate or otherwise, it does not represent a general practice subject to federal control. Whether the condominium declarant violated the warranty is not a dispute involving interstate commerce.

¶ 35 It has been often observed that the "affects commerce" test is easily met.[FN49] But no court has held that the use of materials from other states is, by itself, sufficient to render a private transaction as one "involving interstate commerce." Very few services are rendered and very few products are made using exclusively local materials. While the use of goods shipped in interstate commerce may subject a business to substantive federal regulation, a private contract that is entirely local in subject matter, substantive law, and parties does not acquire an interstate character simply because a refrigerator or a brick was manufactured in another state. The condominium owners purchased real property, not building materials, goods or services. Whatever hold the FAA had or continues to have over the transactions preceding integration of the materials, goods and services into the real estate does not extend to the sale of the real property interest itself.

FN49. *See, e.g., Ratliff,* 906 F.2d at 1316.

¶ 36 Here, a significant right created by state law is at issue. The legislature of Washington state retains sovereignty over local real estate transactions. Despite its *469 strong policy favoring arbitration, the legislature created warranty rights in condominium purchasers and provided an exclusively judicial remedy. We do not think this legislative determination as to the appropriate forum for adjudicating legislatively created rights is preempted solely because construction materials may have crossed state lines.

¶ 37 The reach of the Commerce Clause is broad, but it is not unlimited. We hold that WCA statutory warranty claims are not arbitrable, that contract and common law claims are, and remand for further proceedings consistent with this opinion.[FN50]

FN50. The parties recently advised the court that Satomi Owners Association and the Company have settled. The Association seeks to terminate review, which the Company resists. In addition, proposed amici Master Builders and Blakeley Village, LLC have filed briefs opposing termination of review. We agree with the Company that the issues here will recur and should be determined, and we hereby deny the motion to terminate review. (Judge Susan Agid took no part in the determinations required by these motions.)

APPELWICK, C.J., concur.

AGID, J. (dissenting).

¶ 38 I respectfully dissent from Part II of the majority opinion. Despite recognizing that the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-6, "signals[s] the broadest permissible exercise of Congress' Commerce Clause power" (majority at 465), the strong policy of both state law and the FAA favoring arbitration (majority at 464-65), the purpose of the FAA "to overcome courts' unwillingness to enforce arbitration agreements" (majority at 464), and the "questionable" viability of our decision in *Marina Cove Condominium Owners Ass'n v. Isabella Estates,*[FN1] (majority at 466), the majority still tries to rescue the judicial review provision of the Washington Condominium Act (WCA)[FN2] from federal preemption. Given the interstate nature of condominium sales and the building materials used to construct this condominium, the Warranty Addendum which contains the arbitration clause and covers those very materials evidences a transaction "involving interstate commerce" within the expensive coverage the courts have given the FAA. The FAA

thus preempts the Washington Condominium Act's (WCA) judicial resolution provision. I would reverse and allow arbitration under the Warranty Addendum. FN3

FN1. 109 Wash.App. 230, 34 P.3d 870 (2001).

FN2. RCW 64.34.100(2) (right of action); .030 (non-waiver provision).

FN3. As the majority recognizes (majority at 468-69), even if the FAA did not preempt the WCA remedy here, the arbitration clause still applies to the Association's implied warranty of habitability and Consumer Protection Act claims. It would clearly promote judicial economy to resolve these claims, which arise from identical facts, in one arbitration hearing.

¶ 39 There are two major problems with the majority's approach. First, it relies on authority it admits is of questionable continuing validity for one of its major premises: that "[t]he right to a judicial forum for resolution of WAC warranty disputes cannot be waived." FN4 And, even if this premise is still an accurate statement of the law, the United States Supreme Court has had no difficulty striking down similar non-waiver provisions in Montana, FN5 Alabama, FN6 and California FN7 when they run afoul of the FAA. Second, the majority does everything it can to localize, encapsulate, and miniaturize the transaction at issue here so it can conclude that the business of building condominiums "does not acquire an interstate character simply because a refrigerator or a brick was manufactured in another state." (Majority at 468). This characterization completely misses the point of the cases the majority so carefully outlines at pages 464-66, of its opinion. In the end, it is left relying on distinctions without differences, "facts" that do not distinguish this ***470** case from the letter or the spirit of the Supreme Court's decisions in *Allied-Bruce Terminix Cos. v. Dobson* FN8 and *Citizens Bank v. Alafabco, Inc.* FN9 I would hold that the "general practice" FN10 involved here is building condominiums, not executing local real estate contracts or signing warranty addenda. Interstate commerce is clearly implicated by a project on which not one brick or refrigerator but 70 percent of the building components are manufactured, ordered, and shipped from other states.

FN4. Majority at 467 (citing *Marina Cove,* 109 Wash.App. at 236-37, 34 P.3d 870).

FN5. *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 683, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

FN6. *Allied-Bruce Terminex Cos. v. Dobson,* 513 U.S. 265, 269, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

FN7. *Basura v. U.S. Home Corp.,* 98 Cal.App.4th 1205, 1212, 120 Cal.Rptr.2d 328, *review denied,* 2002 Cal. Lexis 6245 (2002).

FN8. 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

FN9. 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003).

FN10. *Id.* at 57, 123 S.Ct. 2037.

¶ 40 The FAA provides that

A written provision in any maritime transaction or a contract **evidencing a transaction involving commerce to settle** by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [FN11]

FN11. 9 U.S.C.A. § 2 (emphasis added).

The party moving to compel arbitration must make a threshold showing that there is a written agreement to arbitrate and that the contract at issue involves interstate commerce.[FN12]

FN12. *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wash.App. 354, 358, 85 P.3d 389 (2004) (citing *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 978 n. 4 (4th Cir.1985)).

¶ 41 The Company argues the transactions evidenced by the Warranty Addendum involve interstate commerce because over 70 percent of the building materials used to construct the condominium complex were manufactured in and shipped from outside Washington. The Association asserts the origin of the building materials is too remote an interstate connection for the FAA to apply. It contends this court in *Marina Cove* established that condominium purchase and sale agreements between Washington companies and Washington residents do not implicate the FAA.FN13

FN13. 109 Wash.App. 230, 34 P.3d 870.

¶ 42 The FAA's basic purpose is to overcome courts' refusals to enforce arbitration agreements.FN14 The FAA preempts state law, prohibiting state courts from applying state statutes that invalidate arbitration agreements.[FN15] The U.S. Supreme Court has interpreted the phrase "involving commerce" to be the

FN14. *Allied-Bruce*, 513 U.S. at 270, 115 S.Ct. 834.

FN15. *Id.* at 272, 115 S.Ct. 834 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15-16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)).

functional equivalent of the more familiar term "affecting commerce"-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"-that is, within the flow of interstate commerce.[FN16]

FN16. *Citizens Bank*, 539 U.S. at 56, 123 S.Ct. 2037 (internal quotations and citations omitted).

¶ 43 In *Allied-Bruce*, the Gwins entered into a termite protection contract for their home with Allied-Bruce and Terminix.[FN17] They sold their home to the Dobsons, who discovered the house was infested with termites and, along with the Gwins, sued Allied-Bruce and Terminix in Alabama state court. Allied-Bruce and Terminix argued the contract's arbitration clause was enforceable under the FAA despite an Alabama statute which, like the one in question here, made written, predispute arbitration agreements unenforceable. The Alabama Supreme Court ruled the FAA did not apply because ***471** the connection between the termite contract and interstate commerce was too tenuous considering the parties never "contemplated" substantial interstate activity. FN18 The U.S. Supreme Court reversed.

FN17. 513 U.S. 265, 115 S.Ct. 834.

FN18. *Id.* at 269, 115 S.Ct. 834.

¶ 44 After holding that the words "involving commerce" invoked the full extent of Congress' Commerce Clause powers, the Court disapproved of the " 'contemplation of the parties' " test and held the transaction evidenced by the contract need only "in fact" involve interstate commerce.[FN19] The parties did not contest that the transaction involved interstate commerce. Allied-Bruce and Terminix operated in multiple states and "the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the [contract], came from outside Alabama."[FN20] Thus, the FAA applied.FN21

FN19. *Id.* at 279-80, 115 S.Ct. 834.

FN20. *Id.* at 282, 115 S.Ct. 834.

FN21. *Id.*

¶ 45 In *Basura v. U.S. Home Corp.,* homeowners brought suit against a developer for alleged design and construction defects, and the developer moved to compel arbitration based on the arbitration clause in the sale agreements.[FN22] The California Court of Appeals ruled that *United States v. Lopez*[FN23] did not change *Allied-Bruce's* broad interpretation of the FAA's coverage. It then held that the "indicia of interstate commerce are far greater" than in *Allied-Bruce* because constructing the homes involved using building materials and equipment manufactured and shipped from states all over the country.[FN24] The court also noted that the developer had contracted with out-of-state architects, trade contractors, and sub-contractors, and engaged in marketing and advertising throughout the country using interstate media.

FN22. 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328, *review denied,* 2002 Cal. LEXIS 6245 (2002).

FN23. 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). This is the case we erroneously relied on in *Marina Cove* to narrow the test for applying the FAA. 109 Wash.App. at 243, 34 P.3d 870.

FN24. *Basura,* 98 Cal.App.4th at 1214, 120 Cal.Rptr.2d 328.

¶ 46 In *Citizens Bank,*[FN25] the U.S. Supreme Court reaffirmed its holding in *Allied-Bruce* and rejected the proposition that *Lopez* had narrowed that ruling. An Alabama bank had entered into debt-restructuring arrangements with an Alabama construction company, and each arrangement included an arbitration clause. The company brought suit against the bank alleging several claims, and the bank moved to compel arbitration under the FAA. The Alabama Supreme Court again held there was an insufficient nexus with interstate commerce to invoke the FAA. The U.S. Supreme Court again reversed.

FN25. 539 U.S. 52, 123 S.Ct. 2037.

¶ 47 The Court reiterated that Congress' Commerce Clause power " 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.' " FN26 It held that only the general practice need have a substantial effect on interstate commerce.FN27 The Court held the debt-restructuring agreements, although executed in Alabama by Alabama residents, easily passed the FAA's "involving commerce" test for at least three reasons: (1) Alafabco financed projects throughout the southeastern United States using loans that were the subject of the debt-restructuring agreements; (2) the restructured debt was secured in part by Alafabco's inventory of goods assembled from out-of-state materials; and (3) the general practice represented by the transactions at issue, commercial lending, had a broad impact on ***472** the national economy and was clearly within Congress' regulatory power.[FN28] The Court stated the Alabama Supreme Court's decision "adheres to an improperly cramped view of Congress' Commerce Clause power.... *Lopez* did not restrict the reach of the FAA or implicitly overrule *Allied-Bruce Terminix Cos.*-indeed, we did not discuss that case in *Lopez.*"[FN29]

FN26. *Id.* at 56-57, 123 S.Ct. 2037 (alteration in original) (quoting *Mandeville Island Farms v. Am. Crystal Sugar Co.,* 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed. 1328 (1948)).

FN27. *Id.* (citing *Maryland v. Wirtz,* 392 U.S. 183, 196-97 n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), overruled on other grounds, *Nat'l League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976); *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37-38, 57 S.Ct. 615, 81 L.Ed. 893 (1937)).

FN28. *Id.* at 57-58, 123 S.Ct. 2037.

FN29. *Id.* at 58, 123 S.Ct. 2037. Notably, the Texas Supreme Court had earlier used the same reasoning, that *Lopez* did not affect *Allied-Bruce,* in granting mandamus relief and essentially overruling the Texas Court of Appeals' decision in *Kempwood Associates,* which we had relied on in *Marina Cove. See In re L & L Kempwood Assocs., L.P.,* 9 S.W.3d 125 (Tex.1999). Although the only interstate feature of that contract was that the parties lived in different states, the court ruled the contract still involved interstate commerce, so the FAA applied. *Id.* at 127.

¶ 48 If there was any question about whether the far-reaching "involving interstate commerce" test in *Allied-Bruce* remained valid, *Citizens Bank* answered that question in the affirmative. I agree with the majority that our decision in *Marina Cove* is no longer viable. And, as this case and *Basura* highlight, this is especially true because in *Marina Cove* we did not consider whether the manufacture and movement of the building materials in interstate commerce triggers a transaction involving interstate commerce under the FAA.

¶ 49 Here, the Warranty Addendum containing the arbitration clause evidences a transaction "involving interstate commerce" within the U.S. Supreme Court's expansive interpretation of the FAA. The Addendum states in part:

The Unit in the Condominium identified above and the Common Elements are suitable for the ordinary uses of real estate of their type and, except as provided below, all parts of the Unit and Common Elements constructed by or for the Declarant *are free from defective materials* and have been constructed in accordance with applicable law, in accordance with sound engineering and construction standards, and in a workmanlike manner.[FN30]

FN30. (Emphasis added.)

As the Association points out, the Warranty Addendum evidences an agreement between a Washington company and primarily Washington-resident purchasers about warranties on condominiums located within Washington. But the Addendum also specifically addresses the materials used to construct the condominium complex, most of which were manufactured and shipped from outside Washington. *Basura* and *Citizens Bank* give this interstate materials connection significant weight in determining whether the FAA applies. Most importantly, the general practice represented by the transactions at issue, condominium warranties and sales, has an undeniably broad impact on the national economy.[FN31]

FN31. "[E]ven when a transaction is entered into between residents of the same state and consummated in that state, the transaction implicates the FAA when 'in the aggregate the economic activity in question' represents a 'general practice subject to federal control.' " *Legacy Wireless Servs., Inc. v. Human Capital, L.L.C.,* 314 F.Supp.2d 1045, 1052 (D.Or.2004) (quoting *Citizens Bank,* 539 U.S. at 57, 123 S.Ct. 2037). The parties disagree about whether the "general practice" represented by the transactions at issue is condominium sales or the more specific practice of warranties in condominium sales. But both transactions are integral parts of the same general practice-housing construction-which is a multibillion dollar business that obviously affects interstate commerce when the materials are manufactured and shipped from state to state.

¶ 50 That the parties to the Warranty Addendum and the location of the condominium complex are local does not resolve the question whether the transaction involves interstate commerce. While the Addendum may not have as significant an overall interstate nexus as the debt-restructuring agreements in *Citizens Bank* or the sale agreements in *Basura,* this has not been the focus of the Supreme Court's decisions in *Allied-Bruce* and *Citizens Bank.* The interstate nature of the building

materials and the "general practice" of condominium construction and sales is enough to evidence a transaction "involving interstate commerce," given the broad interpretation we must now give that phrase under the cases interpreting the FAA. In this *473 connection, it is important to note that the same out-of-state building materials which implicate interstate commerce are the focus of the Association's claims.[FN32]

FN32. The Association's complaint alleged causes of action based on a "variety of construction defects and other deficiencies in building components and/or installation including, but not limited to, siding and trim, sealant joints, building paper, flashing, penetration wraps, concrete entry patios and walkways, parapet guardrails on walkways, columns, shear walls, windows and concrete slabs on grade."

¶ 51 The majority characterizes this as a "private dispute" to which the FAA does not apply and the warranty as the "general practice" to which we must look under *Citizens Bank.* (Majority at 468). The first characterization begs the question and the second is an attempt to miniaturize the transactions at issue to shield them from interstate significance. All the disputes discussed in *Allied-Bruce, Basura* and *Citizens Bank* were "private." Yet the courts held the FAA applied to them all because, when viewed through the lens of interstate commerce and the purpose of the FAA, all were a part of broader "aggregate economic activity," i.e., pest control using out-of-state products, home building, and loans. Similarly, each of those transactions could have been reduced to its lowest common denominator had the courts wished to ignore the "general practice" of which it was a part. But the U.S. Supreme Court made it very clear when it repudiated the *Lopez* approach in *Citizens Bank* that we may not compartmentalize transactions to avoid the strong federal mandate in favor of arbitration.

¶ 52 Finally, the majority seeks to downplay the significance of the out-of-state materials at issue in this dispute. (Majority at 468). If anything, the connection this condominium project has to interstate commerce is far greater than in *Allied-Bruce.* If any contract would seem to be remote from the reach of the Commerce Clause, it is one between a homeowner and his local Terminex outlet to spray for bugs. Yet the Supreme Court found FAA preemption based solely on Allied-Bruce's multistate operations and the fact that a single commodity-the bug spray-was manufactured in another state. Here, virtually all the materials at issue come from another State. This, too, is a contract that "in fact" involved interstate commerce.[FN33]

FN33. *Allied-Bruce,* 513 U.S. at 279-80, 115 S.Ct. 834.

¶ 53 I agree with the majority that "a significant right created by state law is at issue." (Majority at 468-69). But so were the similar laws invalidated in *Allied-Bruce, Basura,* and *Citizens Bank.* I simply do not think we can ignore the very clear mandate of the U.S. Supreme Court that, where a contract involves a general practice that has a substantial effect on interstate commerce, state laws limiting or prohibiting arbitration must yield to the Federal Arbitration Act.

Wash.App. Div. 1,2007.
Satomi Owners Ass'n v. Satomi, LLC
159 P.3d 460

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Appendix B

Westlaw.

West's RCWA 64.34.100

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 64. REAL PROPERTY AND CONVEYANCES
CHAPTER 64.34. **CONDOMINIUM ACT**
ARTICLE 1. GENERAL PROVISIONS

Current with all 2004 legislation

64.34.100. Remedies liberally administered

(1) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.

(2) Except as otherwise provided in chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding.

CREDIT(S)

[2004 c 201 § 2, eff. July 1, 2004; 1989 c 43 § 1-113.]

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

2004 Legislation

Laws 2004, ch. 201, § 2, in subsec. (2), inserted "Except as otherwise provided in chapter 64.--RCW (sections 101 through 2002 of this act)," preceding "any right or obligation".

NOTES OF DECISIONS

Construction and application 1

1. Construction and application

Washington condominium act (WCA) did not permit condominium owners association and developer to waive enforcement of its provisions by judicial proceeding through limited warranty agreement. Marina Cove Condominium Owners Ass'n v. Isabella Estates (2001) 109 Wash.App. 230, 34 P.3d 870. Condominium 4

Nothing in Washington condominium act (WCA) prevents parties from mediating or otherwise settling their disputes in any manner they wish, including nonbinding arbitration; the WCA only restricts parties' ability to abrogate enforcement of

West's RCWA 64.34.100

its terms by judicial proceeding should alternative methods of dispute resolution fail. Marina Cove Condominium Owners Ass'n v. Isabella Estates (2001) 109 Wash.App. 230, 34 P.3d 870. Arbitration 3.2; Condominium 4

West's RCWA 64.34.100, WA ST 64.34.100

Current with all 2004 legislation

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Appendix C

RCW 64.34.100

Remedies liberally administered.

(1) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.

(2) Except as otherwise provided in RCW 64.55.100 through 64.55.160 or chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter.

[2005 c 456 § 20; 2004 c 201 § 2; 1989 c 43 § 1-113.]

Notes:

Captions not law -- Effective date--2005 c 456: See RCW 64.55.900 and 64.55.901.

Appendix D

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

Derivation

Act Feb. 12, 1925, c. 213, § 1, 43 Stat. 883.

LAW REVIEW COMMENTARIES

A clause you don't want to overlook: Supreme Court enforces arbitration in commercial contracts. Kay O. Wilburn, 6 Bus.L.Today 55 (Nov./Dec. 1996).

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An irresistible force meets an immovable object: Reforming current standards as to the arbitration of statutory claims. Mark A. Cleaves, 8 J.L. & Com. 245 (1988).

Arbitrability of claims arising under Section 10(b) of the Securities Exchange Act: Should Wilko be extended? John G. Malcolm and Eric J. Segall, 50 Alb.L.Rev. 725

C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions

→ § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

Derivation

Act Feb. 12, 1925, c. 213, § 2, 43 Stat. 883.

LAW REVIEW COMMENTARIES

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Applying the Wilko doctrine's anti-arbitration policy in commodities fraud cases. William Lynch Schaller and Robert V. Schaller. 61 Chi.-Kent L.Rev. 515 (1985).

Arbitrability in recent federal civil rights legislation: The need for amendment. Douglas E. Abrams, 26 Conn.L.Rev. 521 (1994).

Arbitrating employment discrimination claims: Do you really have to? Do you really want to? William M. Howard, 43 Drake L.Rev. 255 (1994).

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C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions

→ § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

Derivation

Act Feb. 12, 1925, c. 213, § 3, 43 Stat. 883.

LAW REVIEW COMMENTARIES

Applying the Wilko doctrine's anti-arbitration policy in commodities fraud cases. William Lynch Schaller and Robert V. Schaller, 61 Chi.-Kent L.Rev. 515 (1985).

Arbitrability of disputes under the Federal Arbitration Act. Note, 71 Iowa L.Rev. 1137 (1986).

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C

Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions

→§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

1954 Acts. Senate Report No. 2498, see 1954 U.S. Code Cong. and Adm. News, p. 3991.

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Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions

→ § 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 671.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

Derivation

Act Feb. 12, 1925, c. 213, § 5, 43 Stat. 884.

CODE OF FEDERAL REGULATIONS

Private controversies, arbitration and mediation of, see Koch: Administrative Law and Practice § 2.44.

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Effective: [See Text Amendments]

United States Code Annotated Currentness
Title 9. Arbitration (Refs & Annos)
Chapter 1. General Provisions

→ § 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 671.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

Derivation

Act Feb. 12, 1925, c. 213, § 6, 43 Stat. 884.

CODE OF FEDERAL REGULATIONS

Private controversies, arbitration and mediation of, see Koch: Administrative Law and Practice § 2.44.

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